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ABSTRACT

In view of the dramatic increase in the numbers of laws and lawsuits since the 1960s, teachers must become aware of the privacy considerations and potential legal problems that may arise when writing a letter of recommendation or giving a verbal reference. They should become familiar with present common law doctrine and recent legislation pertaining to exactly what constitutes legally defensible information in a recommendation. The following four laws presently and potentially affect references: the Privacy Act of 1974, the Fair Credit and Reporting Act of 1970, the Family Education Rights and Privacy Act of 1974 and the Buckley Amendment (1974), and the Freedom of Information Act (1966). Besides knowing how these laws affect information, persons providing references should also know how common law dealing with defamation, libel, and slander affect communication. The defenses afforded persons providing statements and letters of recommendation include the securing of permission (waiver), proving that a statement made is true, and using the doctrine of qualified privilege. (This paper includes 10 guidelines for defensible recommendations.) (MN)

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LETTERS OF RECOMMENDATION/VERBAL REFERENCES SHOULD NOT BECOME ENDANGERED COMMUNICATIONS: AN ANALYSIS OF RIGHTS, RESPONSIBILITIES, AND DUTIES OF REFERENCES*

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ABSTRACT

Since 1960, laws and lawsuits have increased five fold. Reflecting this litigious environment, references are increasingly reluctant to say anything negative about a prospective applicant/employee, even if true. Although recommendations can be a valuable tool in the employment process, fear of legal retaliation threatens to undermine their effectiveness.

Laws are not meant to shelter the inefficient worker or poor student. Work, educational, and character references do have strong defenses that protect the rights and responsibilities of references. The strongest of these protections (defenses) is the defense of conditional/qualified information.

This paper explores and discusses laws and defenses, and offers specific recommendations and guidelines for providing and proving legally defensible recommendations.

All types of communications are potential invitations to lawsuits. Thus, it is important for those who teach or work in business to know how the law affects what is written and spoken.

The purposes of this article are to:

1. Alert readers to the privacy considerations and the potential legal problems which may arise when writing a letter of recommendation or giving a verbal reference.
2. Present common law doctrine and review the most recent legislation which affects the employer/appraiser and the employee/appraisee.
3. Present guidelines for providing legally defensible information.

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Evaluations Affect All Of Us

Today, you receive a letter or a telephone call from an employer or university. The message states that someone (a former employee, student, or acquaintance) is applying for a job or for graduate studies and has given your name as a (work, education, or character) reference.

You check your personnel files or grade book. You find that the information contained in the personnel record or grade book is "sketchy" and "vague." You then reflect back to the personal contact you had with this person. As you reflect upon this relationship, you only remember "blemishes." What do you do? What should you do? This is where a legal problem could arise.

Laws Affect What We Write, Say And Do

David Bateman, writing a chapter on "Legal Aspects of Managerial Communication," reported the startling fact that the number of laws affecting communication have increased from 7 in 1960 to 33 in 1980 [1]. Furthermore, as the number of laws has increased, so too has the number of lawsuits.

> A partner in a major Washington D.C. law firm recently observed, "We are in a litigious society. Everybody sues--prisoners, patients, politicians, etc. Among the reasons suggested to explain this phenomenon are that life has become more complex. We do not know how things work. We are illiterate about the sciences and technology. When we seek answers, we are often brushed aside or patronized. We are told by doctors, engineers, educators and car mechanics that we would not understand or that we are better off not knowing. When we are given answers, they are often evasive and in jargon. People often turn to the courts with complaints that are not the product of poor workmanship but simply poor communications" [8].

The observations above can certainly be applied to the issue of references, especially with the evolving issue of confidentiality.

Most business communication (B.C.) textbooks provide minimal coverage or tend to ignore the legal issues involved in communicating in our present law conscious society. Because students in our classrooms will be the managers/references of the future, the discussion that follows dealing with current business practices references, laws affecting references, the tort of defamation, defenses, and guidelines for defensible recommendations is and will be vital to B.C. practioners and teachers.

Let's begin the discussion of recommendations by examining the past and the present status of references.

Confidentiality and References

Historically, reference information has been given and received relatively freely. The vagueness of four recent Federal laws (detailed

later) pertaining to the procedure and content of reference checks contributed to this unrestricted flow of information. [6] Today, however, communications that used to be considered confidential are no longer viewed as such with certainty. Because of recent legislation (current and proposed), the concept of confidentiality may not be a valid reason to deny a person access to records. Thus, when acting as a reference, when records become "open," legal problems and privacy considerations may be encountered. At present, because of the fear of potential lawsuits, many people (employers, teachers or acquaintances) decline to give information to prospective employers unless that information is favorable. In addition, many other employers, when responding to employment inquiries will simply choose the policy of stating only that "the applicant did indeed work for the company between _____ and _____" to avoid explaining why someone left the company in a delicate situation.

This fear, and the resulting lack of reference information has diluted the effectiveness of the employment reference and specifically diluted the recommendation letter as an evaluation tool in the employment process. Furthermore, unless reliable evaluative techniques, other than the employment interview, are discovered and used, the result of the de-emphasis of the recommendation letter may lead to higher personnel turnover, lower production, and increased incidents of employee theft.

Does this have to be so? Is the fear of a lawsuit justified in making the recommendation letter an endangered species? If references knew the laws affecting them and understood the responsibilities and rights the law affords, perhaps not.

Legal Considerations Affecting The Reference

Because the societal definition of values is constantly changing, the legal picture, particularly in the privacy area, is dynamic. Equality and privacy, as these areas affect communication and specifically affect acting as a reference, are two areas of the law that loom as most serious. Historically, reference information has been given and received freely. Four recent Federal laws, however, have caused uncertainty in this area. The four laws that presently and potentially affect references are: [6]

1. The Privacy Act (1974),
2. The Fair Credit and Reporting Act (1970),
3. The Family Education Rights and Privacy Act (1974) (FERPA) and Buckley Amendment (1974), and
4. The Freedom of Information Act (1966).

Because references should be aware of the content of these laws, they are briefly reviewed below.

The Privacy Act. This act grew out of Congressional and public concern over the effect new technology (notably computer storage capabilities) would have on information given and collected. More specifically, the act allows individuals (1) to determine what records pertaining to them are collected, maintained, used, or disseminated; (2) to review records pertaining to them, obtain copies, and correct or amend such records; (3) to prevent the use of information contained in their files

from being used for other than the particular purpose for which it was collected; (4) to bring civil suit for any damages which occur as a result of willful or intentional action which violates any individual rights under the legislation. Currently, this measure applies only to federal agencies or any private business which contracts with a federal agency. (But since the Federal budget is almost a trillion dollars, an enormous number of companies and educational institutions are affected by this law.)

Fair Credit and Reporting Act. This act permits the individual the right to know the nature and substance of his or her credit file. Its impact on reference checking occurs when an investigative consumer report is conducted on a prospective employee. At that time, the individual being investigated has the right of access to the information obtained.

Family Education Rights and Privacy Act (Buckley Amendment). This act allows a student the right to inspect his/her education record and also prevents a university from disclosing certain information pertaining to students without prior consent. This act also applies to a corporation attempting to obtain information about a student. This act does, however, exempt confidential letters of recommendation that were in a student's records before the Act or those letters to which the student has signed a waiver of his or her right of access.

The Freedom of Information Act. This act provides private parties sweeping access to documents held by Federal agencies. Companies regulated by these agencies have complained that the act at times has made trade secrets accessible to competitors, and made other information available to public access which the firm would have preferred to hold in confidence.

To complicate an already complicated situation, besides the laws above, individual states have also enacted or have proposed privacy legislation. Furthermore, some of this legislation may encompass both state agencies and private corporations. And just as with The Federal Privacy Act, this legislation would give all persons the right of access to their personnel files in order to review all material that relates to them or their employment status.

If all records are open, this legislation may have a dramatic impact on business/industry, and references in particular.

Besides knowing how these four laws affect information, references must also know how "common law" affects communication. Common law as it affects references is covered by the tort of defamation.

Defamation

Defamation is defined as follows: A communication is defamatory if it is false and tends to harm the reputation of another as to lower him/her in the estimation of the community or to deter other persons from associating or dealing with him/her. Expanding upon this bare-bones

definition, language is defamatory if it tends to expose another to hatred, shame, obloquy, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons and to deprive him/her of their confidence and friendly intercourse in society [6].

Defamation is subdivided into the torts of libel and slander.

Libel and Slander. Libel is defamation by writing. Slander is defamation through speech. Furthermore, business defamation may be defined as defamation that includes false spoken or written words that tend to prejudice another in his business, trade, or profession and as a natural consequence, prevent him/her from deriving therefrom, that pecuniary reward which probably, otherwise, he/she would have obtained [3].

Because of this potentially volatile climate, communicators must know what they can safely write or say. The law does afford defenses, and communicators should know the defenses that the law allows.

Defenses

The defenses afforded to communicators include the securing of permission (waiver), or proving that the statement made is true, or using the doctrine of qualified privilege. Let's discuss these defenses: real and imagined.

Permission or Waiver. Many employers today routinely obtain the employee's permission before releasing any employee information. They do this for all requests of information; even requests that only ask for verification of employment. These employers mistakenly believe that if they have secured this permission the employee cannot later sue for defamation. In reality, the employee is not waiving his or her legal right to sue for slander. Thus, permissions are generally worthless [4].

A waiver may seem to provide more protection since the employee is asked to waive his/her right to view the communication. Courts, however, tend to ignore such waivers and allow the employee to obtain these documents through traditional discovery techniques during litigation. Furthermore, some courts have even used the waiver against the defendant or have ignored the waiver altogether [2].

Although permission and waiver are not reliable defenses, an employer or defendant who allegedly defames an employee or prospective employee has the opportunity to demonstrate that the communication was true or that the information was privileged. These defenses will now be discussed.

Statement of Truth. If the defendant can prove the truth of a statement (to the satisfaction of a judge or jury,) the plaintiff cannot recover damages for libel or slander. The rationale for this Defense of Truth is that through or by his/her own behavior, the plaintiff has forfeited his/her right to a good recommendation.

Often, however, the truth is difficult to prove. Also, the burden of proof is on the defendant. Furthermore, if the defendant fails to prove the truth of a statement, the judge/jury may consider the use of the truth defense to determine that the defendant acted with malice--(i.e. making a false or possibly untrue statement with intent to harm or show ill will), [7]. Finally, even if the truth was proven, a statement beyond the scope of inquiry and one that does not relate to the situation at hand, that wrongly invades the plaintiff's privacy may be true and still bring liability down from the defendant's head, [3].

As you can see, the Defense of Truth is complicated. The strongest defense, the defense of privilege, will now be discussed.

Privileged Information. There are two chief privileges--absolute and conditional or qualified. Absolute privileges include the Constitutional privilege of members of Congress to say what they will on the floor of Congress. It also allows witnesses to testify with impunity in a Court of Law, [7].

Absolute privilege, however, does not normally apply to employers or educators (unless, of course, they are testifying in a Court of Law). Rather, the defense available to most references is the conditional or qualified privilege.

A conditional or qualified occasion is one in which "a duty (moral, social, legal) to speak and an interest to hear facts about another's performance are relatively more important than an individual's reputation," [5].

A communication relevant to a prospective employee's business conduct or character is conditionally privileged if it is written or spoken in good faith without malice by one who is in a position to evaluate the person and is directed to one who is legitimately interested in such information, [7]. Furthermore, and perhaps more importantly, if the occasion of the communication is ruled to be qualified, the plaintiff must prove that the statement was untrue and that it was made with malice, [3]. Therefore, the burden of proof shifts from the defendant to the plaintiff.

As you can see, defenses do exist, with the strongest defense being the qualified or conditional defense. Thus, in a true reference context--a reference in a position to evaluate and direct communication to a person legitimately interested in that information--the defendant would be immune from tort liability even if a defamatory (but not malicious) statement was made.

One caveat should be made, however. A lawsuit can generate administrative time and attorney's fees even if the case is successful. Perhaps that is why even with these defenses, many employers are reluctant to provide information about current or former employees. This reluctance, however, hinders the employment process, shelters the less productive employee, and may be responsible for poor or less than adequate employment practices.

For these reasons, and because the law affords protection and states that the interest to hear is more important than an individual's reputation, letters of recommendation should not become extinct; rather, they should continue to be used as important employee evaluative tools. To assist the evaluator, the following guidelines for providing defensible recommendations are offered.

GUIDELINES FOR DEFENSIBLE RECOMMENDATIONS

1. Never volunteer information. Respond only to specific company or institutional inquiries and requests. Furthermore, before responding, it would be wise to telephone the inquirer to check on the validity of the request.

2. Direct all communication only to persons who have a specific need for that information.

3. State in the message that the information you are providing is confidential and should be treated as such. Use qualifying statements such as "providing information that was requested;" or "providing information only because it was requested," or "providing information that is to be used for professional purposes only." Sentences such as these imply that information was not presented for the purpose of hurting or damaging a person's reputation.

4. Obtain written consent from the employee or student, if possible.

5. Provide only reference data that relates and pertains to the job and job performance in question.

6. Avoid vague statements such as: He was an average student"; "She was careless at times"; "He displayed an inability to work with others."

7. For documentation, use specific statements such as: "Mr. _____ received a grade of C,-- an average grade"; "Ms. _____ made an average of two bookkeeping errors each week"; or "This spring, four members of the work team wrote letters asking not to be placed on the shift with Mr. _____."

8. Clearly label all subjective statements based on personal opinions. Say, "I feel. . ." whenever making a statement that is not a fact.

9. When providing a negative or potentially negative statement, add the reason(s) or specify the incidents that led you to this opinion.

10. Do not answer trap questions such as "Would you rehire this person?" Also, avoid answering questions that are asked "off the record;" in court there is no such thing.

Being a thorough, competent reference is not an easy task. Not being a reference, however, weakens the employment process and may be the cause of unqualified workers gaining employment. After reading this paper, you know the law does afford defenses to references. You also

know ten guidelines that can be used to avoid civil liability and, at the same time, help other employers to hire the best workers. Knowing how to be a competent reference can improve the job selection process. And improving the selection process means that better workers are hired.

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